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*Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges**

Dissent in state supreme courts has previously been shown to be associated with state socio-economic and political diversity where those courts are insulated from trial bodies by an intermediate appellate court. Here it is demonstrated that diversity on several judges' characteristics—particularly those which reflect environmental backgrounds—interprets this relationship. Moreover, it is shown that judges' characteristics, in this case those reflective of personal or career circumstances, partly account for dissent in those supreme courts which hear appeals directly from trial bodies. These findings are discussed in relation to the controversy over the role of background characteristics in the decisional behavior of collegial courts.

STATE SUPREME COURTS, though relatively little studied, are appropriate subjects for political science research. Most obviously, they are important allocators of values in state political systems. Much of the small body of existing research on these institutions seems motivated by this consideration.¹ State supreme courts are final interpreters of common law and of most state and local legislation. Moreover, U.S. Supreme Court policies often filter down to the local operational level through state supreme courts, sometimes being modified or distorted in the process.² Secondly, the present concern with the explanation of

* The authors wish to thank the University of Kentucky Research Foundation for financial assistance and to acknowledge the research assistance of Justin Green, University of Iowa.

¹ Kenneth N. Vines, "Southern Supreme Courts and Race Relations," *Western Political Quarterly*, XVIII (March, 1965), 5-18; Kenneth N. Vines, "Political Functions of a State Supreme Court," in *Studies in Judicial Politics*, ed. by Kenneth Vines and Herbert Jacob (New Orleans: Tulane University Press, 1961), pp. 51-77, and Stuart S. Nagel, "Political Party Affiliation and Judges' Decisions," *American Political Science Review*, LV (December, 1961), 843-51.

² Walter Murphy, "Lower Court Checks on Supreme Court Power," *American Political Science Review*, LIII (December, 1959), 1017-31 and Francis J. Sorauf, "Zorach v. Clauston: The Impact of a Supreme Court Decision," *American Political Science Review*, LIII (September, 1959), 777-91.

state policy outputs³ could well be expanded from its current emphasis on expenditures to include non-fiscal policies. The decisions of state supreme courts are likely to constitute a prominent dimension of these policies. Finally, the need to develop theory about collegial decision making is patent. The addition of state supreme courts to the list of collegial bodies currently being studied can only expand the opportunities for the collection of meaningful information.

The present paper is part of larger study of dissent on state supreme courts.⁴ Dissent has been featured in much previous judicial research. It is dissent, after all, which produces the variance which scholars of judicial behavior are wont to explain. Unlike most studies of judicial behavior, this study investigates dissent as a characteristic of courts rather than of individual judges. There are sound reasons for this change of focus.⁵ Primary among them is an opportunity to increase our understanding of the relative roles of some major categories of explanatory variables. In the explanation of individual judicial behavior, some scholars emphasize "internal" collegial interaction variables, while others maintain that "external," wider social conflict variables are primary. Among the former, Ulmer and Danelski entertain the hypothesis that judicial votes are in part a function of judges' interaction with their colleagues.⁶ Grossman and Becker have argued that judges' voting behavior is to a considerable degree a product of their

³ Richard E. Dawson and James A. Robinson, "Interparty Competition, Economic Variables and Welfare Policies in the American States," *Journal of Politics*, XXV (1963), 265-89, Thomas R. Dye, *Politics, Economics, and Public Policy Outcomes in the American States* (Chicago: Rand McNally, 1966), Ira Sharkansky, *Spending in the American States* (Chicago: Rand McNally, 1968), and Charles F. Cnudde and Donald J. McCrone, "Party Competition and Welfare Policies in the American States," *American Political Science Review*, LXIII (September, 1969), 858-67.

⁴ Bradley C. Canon and Dean Jaros, "External Variables, Institutional Structure and Dissent on State Supreme Courts," *Polity*, IV (December, 1970), 185-200. See also Bradley C. Canon and Dean Jaros, "State Supreme Courts: Some Comparative Data," *State Government*, XLII (Autumn, 1969), 260-64.

⁵ Canon and Jaros, "External Variables, Institutional Structure and Dissent on State Supreme Courts," pp. 179-80.

⁶ S. Sidney Ulmer, "Toward A Theory of Sub-Group Formation in the U.S. Supreme Court," *Journal of Politics*, XXVII (August, 1965), 133-52 and David Danelski, "The Influence of the Chief Justice in the Decisional Process," in *Courts, Judges and Politics*, ed. by Walter Murphy and C. Herman Pritchett (New York: Random House, 1961), pp. 497-508. More generally, see Walter Murphy, "Courts as Small Groups," *Harvard Law Review*, LXXIX (June, 1966), 1565-74.

role perceptions (e.g., conformity to the expectation that "good" judges adhere to precedent or defer to legislative preferences).⁷ Emphasizing "external" variables, Schubert and others argue that in the main judges' voting behavior is determined by the strength of attitudes held toward broadly posed stimuli conceived as unidimensional issues (e.g., civil liberties claims or government economic regulation).⁸ Similarly, Schmidhauser and Nagel attempt to relate judges' votes to their political and social backgrounds.⁹ It is reasonable to assume that both categories of variables can contribute to an understanding of judicial voting patterns.

However, it is equally reasonable to assume that the relative strength of these classes of variables will vary from court to court. Comparative institutional study clearly facilitates investigation of this question. An analysis of dissent rates in state supreme courts provides an opportunity to assess these variances.

Previous research has demonstrated that state supreme courts insulated from trial bodies by intermediate appellate tribunals (hereafter called Third Level courts) manifest much higher rates of dissent than those not so protected. Moreover, variance in dissent in these courts is largely explained by external variables. Courts with high rates of dissent are particularly likely to be located in states with great socio-economic diversity and high degrees of partisan political competition. Dissent is to a much lesser degree associated with these variables in those state supreme courts which hear cases directly from trial courts (hereafter called Second Level courts).¹⁰

The operation of external variables appears to be inhibited in courts where, due to formal structural arrangement, cases are likely to be of a run of the mill nature and where dockets are likely to be particularly

⁷ Theodore Becker, *Political Behavioralism and Modern Jurisprudence* (Chicago: Rand McNally, 1964) and Joel B. Grossman, "Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter," *Journal of Public Law*, XI (1962), 285-309.

⁸ Glendon Schubert, *The Judicial Mind* (Evanston: Northwestern University Press, 1965).

⁹ John Schmidhauser, "Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States," *University of Toronto Law Journal*, XIV (1962), 194-212, and Stuart Nagel, "Ethnic Affiliations and Judicial Propensities," *Journal of Politics*, XXIV (February, 1962), 92-110. More generally, see Joel B. Grossman, "Social Backgrounds and Judicial Decision-Making," *Harvard Law Review*, LXXIX (June, 1966), 1551-64.

¹⁰ Canon and Jaros, "External Variables, Institutional Structure and Dissent on State Supreme Courts," pp. 198-99.

crowded. In Second Level courts, there is probably relatively little leisure to be sensitive to external variables. Further, their cases are likely to reflect more or less incidental controversy rather than significant social division.¹¹

Though significant, these findings fairly beg two additional questions: (1) what is the nature of the connection between external variables and dissent in Third Level courts and (2) how can the dissent in Second Level courts, which is apparently unrelated to external variables, be explained? Partial answers to these questions can be found, we believe, by elaborating the conception of internal variables and external variables to include the notion of judges' characteristics.

The latter concept is simple and easily elucidated. Let us consider possible ways in which courts could respond to external variables of the type we are considering. First, judges could respond to perceived constituencies. Regardless of their own attitudes and beliefs, they may find it profitable in terms of their own career ambitions to cast votes which appeal to specific interests. In states where judgeships are re-elective or re-appointive, the possibilities of response to constituencies is both overt and obvious. In some states, the support of party leaders or even a partisan convention—which may closely scrutinize judicial records—is a precondition of retaining office.¹² Even in non-partisan judicial elections, candidates for the state supreme court have made direct appeals to specific and identifiable social groups.¹³ Representatives in other branches of government have frequently taken "delegate" roles;¹⁴ evidence of this kind suggests that similar behavior, if of a less overt kind, may characterize judges.

Second, judges in their own attitudes and beliefs may mirror the political and social characteristics of their states. It is this possibility that articulates with the concept of judges' characteristics. Put simply, judges' voting behavior may not be in response to perceived constituency demands, but instead may be a direct function of personally held dispositions. Persons may be selected to the judgeship because

¹¹ *Ibid.*, pp. 192-94.

¹² S. Sidney Ulmer, "The Political Party Variable in the Michigan Supreme Court," *Journal of Public Law*, XI (1962), 352-62. More generally, see Herbert Jacob, *Justice in America* (Boston: Little, Brown, 1965), pp. 96-101.

¹³ David Adamany, "The Party Variable in Judges' Voting: Conceptual Notes and a Case Study," *American Political Science Review*, LXIII (March, 1969), 57-73, and Jack Ladinsky and Allan Silver, "Popular Democracy and Judicial Independence," *Wisconsin Law Review* (Winter, 1967), 128-69.

¹⁴ John Wahlke, et al., *The Legislative System* (New York: John Wiley, 1963).

their dispositions are congruent with those of prominent interests within the state. Thus, in heterogeneous states, there may be a high probability that judges of considerable substantive attitudinal diversity will be recruited. Divergent interests may each be able to place a sympathetic judge on the court. Similarly, in more homogeneous environments, judges might be expected to share attitudes and beliefs, all having been socialized in approximately the same socio-economic and political environments.

Though the model of judges as delegates cannot be dismissed, we believe that it is less likely to describe reality than the second possibility. First, it is doubtful that constituencies are often capable of accurately perceiving officials' policy intentions and responding by the proffering or withdrawal of support. The literature on voting behavior in particular casts doubt on the existence of such a "rational" posture for mass publics.¹⁵ Second, judges on state courts are not highly visible among office holders. Even an extremely vigilant public would have difficulty holding relatively cloistered judicial officials responsible. Moreover, even legislators who, unlike judges, have well defined constituency relationships, are known to base many decisions on individually held attitudes.¹⁶ Indeed, we would expect that judges would fairly frequently act on the basis of such attitudes; it is thus not surprising to find a body of literature demonstrating that this does in fact occur.¹⁷

We are now prepared to suggest a model of the connections between socio-economic and political features of states and dissent such as we observe in Third Level courts. It is indicated in Figure 1. Intervening between socio-economic and political features of states and dissent rates are socio-economic and political characteristics of judges. We hypothesize that relationship A in Figure 1 is observed only because of the existence of relationships B and C. If this model approximates reality, not only must relationships A, B, and C exist, but when relationship A

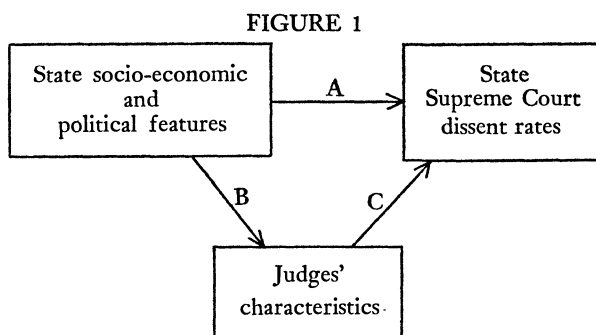
¹⁵ Angus Campbell, *et al.*, *The American Voter* (New York: John Wiley, 1960); Bernard Berelson, *et al.*, *Voting* (Chicago: University of Chicago Press, 1954).

¹⁶ Warren E. Miller and Donald Stokes, "Constituency Influence in Congress," *American Political Science Review*, LVII (March, 1963), 45-56; Charles Cnudde and Donald J. McCrone, "The Linkage Between Constituency Attitudes and Congressional Voting Behavior: A Causal Model," *American Political Science Review*, LX (March, 1966), 66-72; Wahlke, *et al.*, *op. cit.*

¹⁷ Schubert, *op. cit.* For state supreme courts, see Kenneth N. Vines, "Judicial Role Perceptions and Role Behavior," in *Frontiers of Judicial Research*, ed. by Joel Grossman and Joseph Tanenhaus (New York: John Wiley, 1969), pp. 461-85.

is controlled for judges characteristics, it should decline markedly. An alternative model is one in which socio-economic and political variables are related to dissent rates independently of judge characteristics. In other words, A exists regardless of what B and C are like. Thus, if relationship A is controlled for judge characteristics, it should not decline appreciably. Relationships B and C might exist, but the latter would be spurious, a function of the fact that both dissent rates and judge characteristics were independently associated with socio-economic and political variables.

Judge characteristics may also be applicable to dissent in Second Level courts. Such dissent could be a function of those characteristics of judges which are not related to socio-economic or political features of states. Since meaningful social controversy may only infrequently



THE THIRD LEVEL COURT MODEL

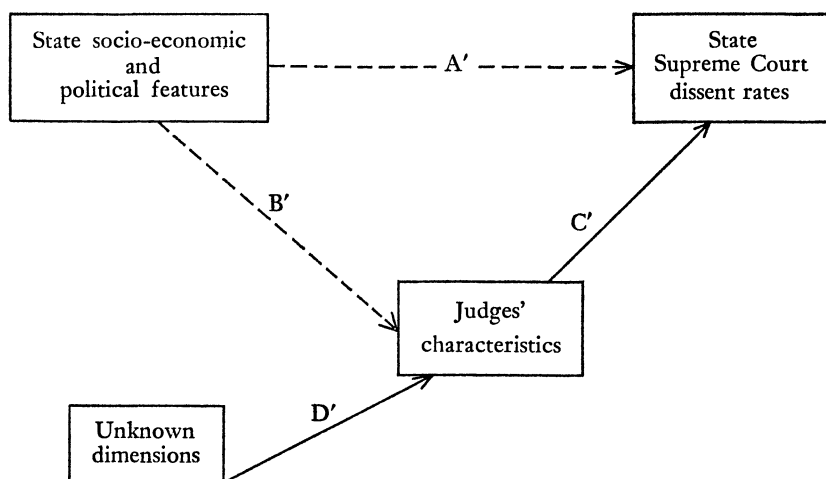
be reflected in the cases judges on such courts hear, such dissent as does occur may result from personal "idiosyncracies." That is, personality characteristics or dimensions of academic and legal training, for example, may be activated to produce dissensual behavior along quite obscure dimensions.¹⁸ Studies of small groups, of course, demonstrate that there is considerable variance in willingness to subscribe to consensual norms.¹⁹ Somewhat along the same lines, Huitt and

¹⁸ Sheldon Goldman, "Politics, Judges and the Administration of Justice" (unpublished Ph.D. dissertation, Harvard University, 1965). Also see Michael Giles and Thomas Walker, "Consensus and Dissensus in Small Political Groups: A Note Concerning Non-Conformity on State Supreme Courts," University of Kentucky, Department of Political Science, 1970. (Mimeographed.)

¹⁹ Robert R. Blake, *et al.*, "The Generality of Conformity Behavior as a Function of Factual Anchorage, Difficulty of Task and Amount of Social Pressure,"

Matthews have shown that some legislators have a proclivity to resist institutional demands for conformity.²⁰ It requires no great inferential leap to suggest the operation of similar dynamics among judges. Moreover, it is possible that different types of formal training produce variance in behavior which has nothing to do with socio-economic or political stimuli. Becker, for example, argues that legal training is a crucial factor determinative of judges voting behavior.²¹

FIGURE 2



THE SECOND LEVEL COURT MODEL

We can now present a model of the connections between judges' characteristics and dissent such as were observed in Second Level courts (Figure 2). In this model, the judge characteristics emphasized are different from those in Figure 1. They are more likely to reflect

Journal of Personality, XXV (March, 1957), 294-305, Stanley Rosner, "The Consistency of Response to Group Pressures," *Journal of Abnormal and Social Psychology*, LV (July, 1957), 145-46, Solomon E. Asch, "A Minority of One Against A Unanimous Majority," *Psychological Monographs*, LXX (1956), No. 9.

²⁰ Ralph K. Huitt, "The Outsider in the Senate: An Alternative Role," *American Political Science Review*, LV (September, 1961), 566-75; Donald Matthews, *U.S. Senators and Their World* (Chapel Hill: University of North Carolina Press, 1960), Chapter 5.

²¹ Becker, *op. cit.*, pp. 102-03. Cf. Theodore Becker, "A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations," *American Political Science Review*, LX (September, 1966), 677-80.

particular experiences in the lives of individual judges than general environmental conditions. We posit that relationship C' exists in the absence of relationships A' and B'. Though we posit D' relationships to explain judges' characteristics, we are not prepared to indicate definitively what the unknown independent variables are.

It should be noted at this point that some judges' characteristics might be thought of as roughly congruent with distributions of individual attitudes. However, it would be exceedingly difficult to characterize directly state supreme courts as to the attitudinal diversity of their judges. Valid attitudinal measurement, such as would be accomplished through survey research, of such a large number of geographically dispersed officials is beyond the means of all but generously funded researchers. Further, such techniques would most likely encounter considerable respondent non-cooperation.²² The inference of attitudes from judicial opinions also involves considerable expense; moreover, this process contains a degree of circularity as there is doubtless a close connection between opinions and decisions, the latter comprising what we are attempting to explain. However, it makes good sense to describe courts in terms of the characteristics of their judges. Diversity of party, mean educational levels, and variance in size of judges' home communities, for example, can easily be determined. The inference of behavioral and attitudinal dispositions from demographic variables has a long history in social science research. Despite the limitations of such an approach, we are not alone among scholars of judicial behavior²³ in finding it useful and appropriate.

METHOD

Measurement of Dependent Variables

Data on 56 state supreme courts were gathered in the following manner.²⁴ Samples of cases were collected from the seven year period,

²² Stuart Nagel received replies from approximately one-third (119 out of 313) of American state supreme court judges to whom he mailed a questionnaire. See his "Political Party Affiliation and Judges' Decisions."

²³ See the works cited in Grossman, "Social Backgrounds and Judicial Decision-Making." Cf. Stuart S. Nagel, *The Legal Process From A Behavioral Perspective* (Homewood, Illinois: The Dorsey Press, 1969), Chapters 14, 16, 18.

²⁴ Texas and Oklahoma have two supreme courts apiece, divided by civil and criminal jurisdiction. The Missouri and Washington Supreme Courts are separated into two permanent divisions; both also hear cases *en banc*. Thus there are 56 distinct supreme courts in the American states.

1961-67. This was accomplished by selecting volumes of relevant regional law reporters for this time period for each court using a table of random numbers. Excepting *per curiam* cases²⁵ and memoranda, all cases in the chosen volumes were recorded. A sufficient number of volumes were selected for each court to meet two minima; (1) 100 cases were recorded,²⁶ (2) seven volumes were exhausted. Sample sizes ranged from 100 to 320 with an average of 140.7. In all there were 7,880 cases involved. For purposes of this paper, the relevant variables noted were presence or absence of dissent and the type of case involved. The latter involved division into three categories: criminal cases, "governmental" cases,²⁷ and a residual category.

The use of the "governmental" classification rests upon the fact that social and economic or political controversies are likely to be manifest in particular kinds of cases. While most criminal cases and ordinary civil cases probably do not involve major allocations of value with appreciable social consequences, many cases which involve the discretion or power of government officers or agencies do. By settling, e. g. "disputes over elections, appointments to government positions in the states, or disputes between different government agencies over jurisdiction, power or money,"²⁸ courts are enunciating policies with far reaching effects; the relative fortunes of various clientele groups are profoundly affected by such decisions. The importance of litigation bearing on the power and discretion of governmental units in large urban areas underscores this point.

Since the statistical probability that dissent will occur (assuming equi-probable voting choices on the part of the judges) increases

²⁵ In states where *per curiams* exceeded 10% of the court's output, those in excess of one full page in the regional reporter were included. Only two states, Alabama and Ohio, fell into this category. In addition, the Missouri Supreme Court uses the *per curiam* designation to signify the court's adoption of an opinion written by court commissioners and these were included in our sample.

²⁶ The Missouri Supreme Court sitting *en banc* hears very few cases; our *N* for this court is 48.

²⁷ Governmental cases were operationally defined for coding purposes as "civil cases involving questions about the division of powers between governmental units or officers, or questions about the extent of the powers and/or responsibilities of governmental units or officers."

²⁸ Kenneth N. Vines, "Courts as Political and Governmental Agencies," in *Politics in the American States*, ed. by Herbert Jacob and Kenneth N. Vines (Boston: Little, Brown and Co., 1965), p. 273.

²⁹ Kenneth N. Dolbeare, *Trial Courts in Urban Politics* (New York: John Wiley, 1967).

with the size of the court, we have calculated an Index of Dissent (*ID*) which controls for the number of judges. This is expressed, $ID = D_a/D_e$, where *ID* is Index of Dissent, D_a is the actual proportion of cases in which dissent occurs, and D_e is the statistically expected proportion of cases in which dissent occurs, based on the mean actual number of judges hearing cases.³⁰ For most courts, *ID* and D_a are nearly identical; however, for small bodies (e.g., those of Alaska, Indiana and Nevada) *ID* is appreciably larger. *ID* ranged from 49.8 in New York to 0.0 in Tennessee and the Oklahoma Court of Criminal Appeals. The average is 13.5.³¹ These figures suggest that there is somewhat more dissent in state supreme courts than has previously been realized.³² We have calculated similar indices of dissent for criminal cases (*CRID*) and for "governmental" cases (*GID*).

Measurement of Independent Variables

Data on socio-economic and political characteristics of states were all collected from published aggregate statistics. Seven socio-economic and six political variables were measured.³³ These variables reflect

³⁰ The expected proportion of dissent is $D_e = 1 - 2/2^n$, where n equals the mean number of judges hearing cases rounded to the nearest whole number. This formula is based on the fact that the votes of n judges may mathematically be arranged in 2^n possible combinations, only two of which represent unanimous decisions. For example, in Wyoming, an average of 3.9 judges heard cases. Thus, expected dissent may be obtained by $D_e = 1 - 2/2^4 = 1 - 2/16 = 1 - .125 = .875$. $D_a = 6.0\%$. And $ID = D_a/D_e = .06/.875 = .069$ or 6.9%.

³¹ The standard deviation is 12.8. For Third Level Courts ($N = 19$) the range is 0.0 to 49.8, the mean *ID* is 20.1 and the standard deviation is 16.1. For Second Level Courts ($N = 37$) the range is 0.0 to 48.9, the mean *ID* is 10.1 and the standard deviation is 9.8. Three states added intermediate level appellate courts during the 1961-67 period. In these cases, we put each court in that category which prevailed during the majority of the time period.

³² Sickels finds an average dissent rate of 10.6% in a non-random survey. Robert J. Sickels, "The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals," *American Political Science Review*, LIX (March, 1965), 100-04. See also Vines, "Courts as Political and Governmental Agencies," p. 271; Council of State Governments, "Workloads of State Courts of Last Resort," Chicago, 1968, Table 5. (Mimeographed.); and Herbert Jacob and Kenneth N. Vines, "The Role of the Judiciary in the American States," in *Judicial Decision-Making*, ed. by Glendon Schubert (New York: Free Press, 1963), p. 246.

³³ Socio-economic data were drawn from the 1960 U.S. Census of Population or from the *Statistical Abstract of the United States* (1960 data), except for data on union membership which came from the *Directory of National and International Labor Unions in the U.S.*, Bulletin No. 1596 (Washington: Department of Labor, 1968). Political data were taken from the annual editions of the *World Almanac* or the biennial editions of *America Votes*.

significant dimensions of social conflict. Questions of urban-rural controversy, ethnic and cultural differences, distribution of wealth, and, of course, partisan political controversy are represented. These thirteen variables along with the aggregate characteristics of judges of the various state supreme courts (to be discussed below) were factor analyzed. Varimax rotation produced two unambiguous factors, one incorporating four socio-economic variables and the other incorporating five political variables (See Table 1). The first factor may be called "urbanism." This is an appropriate indicator of social heterogeneity for as populations become more concentrated in cities, most forms of human activity become more complex. Concentration and industrialization are associated with a more diverse economy and thus with greater specialization. This produces a basis for a large number of relatively specific interests. The resultant configuration of demands upon governmental agencies becomes more varied.³⁴ Similarly, in the American historical experience, many ethnic and religious minorities have settled primarily in urban areas, thus making such environments more socially diverse.

It is reasonable to name the second factor "political competitiveness" given the variables which load highly on it. Normalized factor scores were assigned to each state such that each possesses a value for urbanity and for political competitiveness.³⁵

One of the reasons for resorting to factor analysis at this point is that we are able to proceed with two distinct conceptually relevant independent variables rather than thirteen quite similar indices.³⁶ This enables the performance of statistical operations that would be cumbersome or impossible with large numbers of independent variables.

Aggregate characteristics of judges in each court were determined in the following way. National and regional *Who's Who* volumes,

³⁴ Oliver P. Williams, *et al.*, *Suburban Differences and Metropolitan Politics* (Philadelphia: University of Pennsylvania Press, 1965), Chapter 2; Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge: Harvard University Press, 1963), Chapter 3.

³⁵ The factor analysis program used was FACTOR ANALYSIS W/PLOT by James Johnson, (University of Oregon) which incorporates subroutines in the IBM Scientific Subroutine Package. Factor scores were computed on a modified version of the ESTFAC program available at the University of Kentucky Computing Center. This program converts conventional factor scores into normalized scores, ranging from zero and 100, with 50 representing the mean.

³⁶ See the discussion of this use of factor analysis in Hubert M. Blalock, *Social Statistics* (New York: McGraw-Hill, 1960), p. 384.

TABLE 1

LOADINGS OF SEVEN SOCIO-ECONOMIC AND SIX POLITICAL VARIABLES ON URBANISM AND POLITICAL COMPETITIVENESS FACTORS (VARIMAX ROTATION)

Variable	Urbanism Factor	Political Competitiveness Factor
Deviation of mean Democratic percent of gubernatorial vote from 50%	-.12	-.33
Deviation of mean Democratic percent of lower house from 50%	-.05	-.75
Deviation of mean Democratic percent of Senate from 50%	-.10	-.76
Deviation of mean Democratic percent of all elected executive officials from 50%	-.03	-.86
Years elected offices divided by party	.15	.88
Index of partisan division *	.14	.88
Per capita state revenues	.37	.68
Percent of population living in urban areas	.87	.21
Percent of population in SMSA's over 500,000	.76	.03
Percent of population living on farms	-.72	-.12
Percent of population in white collar occupations	.68	.36
Percent of population of foreign stock **	.40	.39
Union members as percent of non-agricultural population	.38	.30

* This index is formed by the summation of the number of years elected executive offices are divided by party, the number of years the legislature is divided by party and the number of years the governor and both houses of the legislature are divided by party.

** Following the U.S. Census definition, this measure includes foreign born and first-generation native Americans. However, persons with origins in Great Britain or Canada are excluded from consideration in this paper.

the 1955 *Directory of American Judges*,⁸⁷ and available official publications of states were searched for references to the supreme court judges who served during the 1961-1967 period. Data on ten characteristics reflective of judges' political and social environments and seventeen characteristics reflective of individual personal experiences could be collected on most judges from these sources.⁸⁸ Some 487 judges had served during this period, and data were available on 421 or 86.4 percent of them. For all courts except Oklahoma Court of Criminal Appeals (which is therefore excluded from the analysis in this paper) data were available on at least 50 percent of the judges; for most courts, this figure approached 100 percent. These data were compiled into aggregate values for each court either by assigning mean values or by indicating dispersion as appropriate.

The twenty-seven judge characteristic variables by which the courts were measured were then correlated with *ID*, *GID*, and *CRID*. Most bore little relationship to these measures of dissent. Eight variables, however, were at least moderately associated with one or more dependent variables (Table 2). Four of these were environmental variables and four were personal variables. The former are proportion of judges whose last private practice was in metropolitan areas, proportion of judges whose last private practice was in rural areas, deviation of the partisan division of judges from 50 percent (in other words a

⁸⁷ Clyde Liebman, ed., *Directory of American Judges* (Chicago: American Directories Corp., 1955).

⁸⁸ The ten environmental variables are: (1) place of birth (in-state, out of state), (2) place where B. A. received, (3) place where LL. B. received, (4) type of school from which B. A. received (state, religious, prestigious, etc.), (5) type of school from which LL. B. received, (6) last private practice located in rural area (town of less than 25,000 population), affirmative or negative, (7) last private practice located in metropolitan area (town of 100,000 or greater population), (8) last private practice in intermediate category, (9) partisan affiliation, (10) religious preference. The seventeen personal variables are: (1) age, (2) tenure, (3) possession of B. A. degree, (4) possession of higher academic degree, (5) possession of law degree, (6) possession of higher law degree, (7) experience as counsel for city, county or other local governmental agency, (8) experience as law enforcement officer (sheriff, FBI, etc.), (9) experience as lower court judge, (10) experience as legislator, (11) experience as policy-making official (in non-lawyer capacity) in local, state or federal executive branch, (12) experience as State Attorney-General or Assistant Attorney General, (13) experience as a prosecutor, (14) experience as member of semi-independent regulatory board, (15) experience as party or partisan campaign official, (16) number of civic organization memberships, (17) number of legal organization memberships.

TABLE 2
RELATIONSHIP OF JUDGES' CHARACTERISTICS TO RATES OF DISSENT *

	Proportion whose last practice was in metro- politan area	Proportion whose last practice was in rural area	Deviation of partisan division from 50%	Religious diversity **	Proportion possessing bachelor's degree	Proportion having held legislative office	Proportion having held lower judgeship	Mean number of civic organizations in which memberships held
All courts (N = 55)								
ID	.29	-.15	-.20	.16	-.07	-.19	.15	.17
GID	.25	-.19	-.14	.11	-.03	-.19	.19	.17
CRID	.23	-.12	-.23	.29	-.08	-.21	.09	.26
Third level courts (N = 19)								
ID	.29	-.34	-.49	.42	.28	-.15	.15	.30
GID	.35	-.44	-.43	.35	.33	-.34	.24	.33
CRID	.16	-.22	-.63	.48	.19	-.18	.03	.26
Second level courts (N = 36)								
ID	.06	.05	.07	-.01	-.42	-.27	-.11	-.12
GID	-.03	.05	.13	-.05	-.33	-.14	-.04	-.12
CRID	.14	.01	.11	.19	-.29	-.27	-.03	.14

* The entries in this table and all others indicating relationships between pairs of variables are Pearson product-moment correlation coefficients (r).

** See note 39 in the text for a full definition.

measure of partisan homogeneity), and judges' religious diversity.³⁹ These variables rather clearly refer to the political and social backgrounds from which judges are recruited to the court. Personal judge characteristics, on the other hand, are not so obviously indicative of the environment. These variables, proportion of judges having previous legislative experience,⁴⁰ proportion of judges having previously served in a judicial capacity, proportion of judges possessing a bachelor's degree, and mean number of civic organizations to which judges belong are more reflective of judges' individual circumstances. Such characteristics might be expected to vary independently of environmental background characteristics.

FINDINGS: THE THIRD LEVEL COURT MODEL

Socio-economic and Political Variables and Dissent Rates: The A Relationships

We noted above that external variables, be they socio-economic or political in nature, are capable of explaining a proportion of the variance in dissent on state supreme courts. In a previous publication, we demonstrated that the multiple correlation between seven socio-economic variables and *ID* was .38. The corresponding *R* for *GID* was .40 and for *CRID* the *R* was .42. The treatment of six political variables in a similar fashion produced *R*'s of .23, .27, and .39 for *ID*, *GID* and *CRID* respectively. The effect of these external variables was even more pronounced in Third Level Courts. Here the multiple correlations between the seven socio-economic variables and *ID*, *GID*, and *CRID* respectively are .57, .78, and .56. Correspondingly, *R*'s for the six political variables are .51, .58, and .56.⁴¹

The findings reported in Table 3 and consistent with the general

³⁹ In states with religiously homogeneous courts, all judges would be in the same religious category, while in the most heterogeneous courts, the judges would be spread over the maximum of four categories. The categories are: (1) Jewish, (2) Roman Catholic, (3) High status Protestant (Episcopalian, Unitarian, Presbyterian, Congregationalist), (4) Low status Protestant (Baptist, Methodist, Lutheran, Christian and miscellaneous). These categories are adopted from John R. Schmidhauser, *The Supreme Court: Its Politics, Personalities and Procedures* (New York: Holt, Rinehart and Winston, 1960), pp. 38-39.

⁴⁰ This includes service on city or county governing boards as well as state legislative or Congressional service.

⁴¹ Canon and Jaros, "External Variables, Institutional Structure and Dissent on Supreme Courts," pp. 198-99.

thrust of the multiple correlation data. There *ID*, *GID* and *CRID* are examined for their relationship with external variables in the form of our urbanism factor and political competitiveness factor. Though the relationships are somewhat smaller, again some association between dissent and external variables is revealed in all state supreme courts and an accentuated one appears in Third Level Courts. In other words, the A relationships indicated in Figure 1 are indeed prominent in Third Level Courts. This is particularly true for "governmental" cases, the kinds most likely to involve significant social controversy. This is, of

TABLE 3

RELATIONSHIP OF STATE URBANISM AND POLITICAL COMPETITIVENESS
TO RATES OF DISSENT

	All Courts (N = 55)		Third Level Courts (N = 19)		Second Level Courts (N = 36)	
	Urbanism	Political Compet.	Urbanism	Political Compet.	Urbanism	Political Compet.
ID	.25	.12	.25	.38	.05	.05
GID	.34	.13	.46	.59	.14	-.16
CRID	.16	.19	.11	.30	.02	.22

course, as expected and confirms our assumption that these factors are reasonable compressions of the original socio-economic and political variables.

Judge Characteristics and Dissent: The C Relationships

To some extent, our methodological procedures have determined that there will be strong C relationships. As indicated previously, judge characteristics were selected for their high association with dissent rates. Thus the results reported in the first column of Table 4 are not really surprising. Multiple correlations indicate the *collective* effect of all eight judge characteristics not only on all courts together, but on Third Level Courts and Second Level Courts as well. It is evident that the impact of judge characteristics, especially in Third Level Courts, is fairly substantial.

But more importantly for the Third Level Court model, account needs to be taken of the differential effect of environmental and personal judge characteristics. In Third Level Courts, we would expect a particularly close relationship between the former characteristics and

dissent. The second and third columns of Table 4 present these data. Environmental characteristics are indeed strongly related to dissent in these courts. However, it must be noted that personal judge characteristics are also important, although somewhat less strongly related to dissent.

Socio-economic and Political Variables and Judges' Characteristics: the B Relationships

For the Third Level Court model to be valid, there must exist strong relationships between our urbanism and political competitiveness vari-

TABLE 4

MULTIPLE RELATIONSHIPS OF JUDGES' CHARACTERISTICS TO RATES OF DISSENT *

	All Judge Characteristics	Environmental Judge Characteristics	Personal Judge Characteristics
For All Courts (N = 55)			
ID	.42	.37	.32
GID	.39	.30	.34
CRID	.47	.42	.34
For Third Level Courts (N = 19)			
ID	.67	.56	.44
GID	.69	.56	.58
CRID	.79	.68	.33
For Second Level Courts (N = 36)			
ID	.52	.14	.50
GID	.40	.17	.37
CRID	.50	.24	.43

* Entries in this table and all others indicating relationships between several independent variables and a single dependent variable are Pearson multiple correlation coefficients (*R*).

ables and the environmental judge characteristics. Table 5 demonstrates that this is in fact the case. However, the corresponding relationships for personal judge characteristics are only moderately smaller. This parallels our above finding that personal judge characteristics were almost as strongly related to *ID*, *GID* and *CRID* as were environmental ones in these courts. It seems that insofar as the Third Level Court model is operative, it depends upon the intervention of both environ-

mental and personal judge characteristics. Though unexpected in terms of our model, this suggests that personal characteristics of recruits to judicial positions are to some extent dependent upon the system's socio-economic and political environment.

Interaction in the Third Level Court Model

The A, B, and C relationships we have shown are consistent not only with the Third Level Court model in which environmental judge

TABLE 5

RELATIONSHIP OF STATE URBANISM AND POLITICAL COMPETITIVENESS
TO JUDGES' CHARACTERISTICS IN THIRD LEVEL COURTS

	Urbanism	Political Competitiveness
Environmental Judges' Characteristics		
Metropolitan Practice	.34	.47
Rural Practice	-.42	-.53
Partisan Homogeneity	-.26	-.65
Religious Diversity	.35	.53
Personal Judges' Characteristics		
Bachelor's Degree	.14	.24
Legislative Office	.59	.45
Lower Judgeship	-.25	-.42
Civic Organizations	.07	.27

characteristics intervene between state socio-economic or political features and dissent rates, but also with the alternate configuration in which such features are related independently to both dissent rates and judge characteristics. The most direct evaluation of these alternatives is accomplished by controlling the A relationships for judge characteristics. In Table 6, partial correlations between urbanism and political competitiveness on the one hand and various indices of dissent on the other when controlled for (1) all judge characteristics simultaneously, (2) environmental judge characteristics, and (3) personal judge characteristics are presented. It is notable that controlling for environmental characteristics does produce marked declines from the

values of the zero order relationships shown in Table 3. In some cases, negative relationships are observed. Controlling for personal judge characteristics similarly produces declines, but to a smaller degree. The simultaneous control for all judge characteristics reveals, particularly with respect to political competitiveness, that there is some cumulative effect.

Controlling for each judge characteristic individually reveals that

TABLE 6
RELATIONSHIP OF STATE URBANISM AND POLITICAL COMPETITIVENESS
TO RATES OF DISSENT IN THIRD LEVEL COURTS WITH JUDGES'
CHARACTERISTICS CONTROLLED *

	Urbanism	Political Competitiveness
All Judges' Characteristics Controlled		
ID	.11	-.20
GID	.34	.16
CRID	-.04	-.53
Environmental Judges' Characteristics Controlled		
ID	.01	-.08
GID	.29	.33
CRID	-.18	-.34
Personal Judges' Characteristics Controlled		
ID	.18	.22
GID	.38	.38
CRID	.06	.19

* The entries in this table are in the first panel eighth order partial correlation coefficients and in the other panels fourth order partial correlation coefficients.

the urbanism variable operates upon dissent in about an equal proportion through each of the four environmental judge characteristics. Political competitiveness, however, is disproportionately operative through only one of the environmental judge characteristics—partisan division. When this variable is added to the partials between competitiveness and dissent rates, the values of the relationships drop considerably. Indeed, when the relationships are controlled for this variable

alone, the partials for *ID*, *GID*, and *CRID* respectively are: .10, .45, and - .18. These are not appreciably different from the corresponding values of - .08, .33, and - .34 (see Table 5) which result from the simultaneous control of all four environmental judge characteristics.

It thus appears that the Third Level Court model has considerable validity. A good deal of the relationship between urbanism and political competitiveness on the one hand and dissent rates on the other depends upon judge characteristics. However, a caveat must be entered. Though controlling produces diminutions of the relationships, there remain, particularly in the all-important "governmental" cases, correlations of some magnitude.⁴² This must be taken to mean that though our hypothesized Third Level Court model apparently describes the paramount features of the relationship, additional kinds of connections exist between external variables and dissent.

⁴² Path analyses confirm that state political competitiveness operates through partisan diversity of the court in affecting the rates of *ID* and *CRID*, but does not seem to follow this route in affecting the rate of *GID*. The calculations are set forth below:

	Actual	Expected	Diff.	Model Inferred
For <i>ID</i>				
$r_{ArB} = r_C$	.49	.25	.24	Operates through partisan diversity
$r_{BrC} = r_A$	.38	.32	.06	
For <i>GID</i>				
$r_{ArB} = r_C$	.43	.38	.05	Direct connection
$r_{BrC} = r_A$	.59	.28	.31	
For <i>CRID</i>				
$r_{ArB} = r_C$	.63	.20	.43	Operates through partisan diversity
$r_{BrC} = r_A$	.30	.41	.11	

Similar path analyses interpreting the relationship between state urbanism and competitiveness variables and dissent but involving other environmental judge characteristics demonstrate a similar pattern: clear inferences of an indirect relationship through the intervening characteristic in the cases of *ID* and *CRID*, and ambivalent inferences in the case of *GID*. For discussion of path analysis, see Hubert M. Blalock Jr., *Causal Inferences in Non-Experimental Research* (Chapel Hill: University of North Carolina Press, 1964), p. 65 ff. For an example of its application to a three variable situation similar to ours, see Ira Sharkansky, "Agency Requests, Gubernatorial Support and Budget Success in State Legislatures," *American Political Science Review*, LXII (December, 1968), 1220-31.

FINDINGS: THE SECOND LEVEL COURT MODEL

Socio-economic and Political Variables and Dissent Rates: the A' Relationships

As we have suggested, Second Level Courts are fundamentally different from Third Level Courts in that dissent does not relate to state environmental features. In a previous publication, we demonstrated that correlations between seven socio-economic variables and *ID*, *GID*, and *CRID*, were quite low, especially when compared with Third Level Courts. The same is true with respect to political variables.⁴³ This finding is confirmed in Table 3 where we note that our urbanism and political competitiveness variables have for all practical purposes no relationship to dissent rates in these courts.

Judges Characteristics and Dissent: the C' Relationships

Again not surprisingly, we find judges characteristics to be reasonably strongly related to dissent rates in Second Level Courts (see the Second Level Court findings in the first column of Table 4). In one sense, this finding is similar to that for Third Level Courts. However—and this is crucial for the Second Level Court model—a glance at the remaining columns of Table 4 shows clearly that the operative judge characteristics in Second Level Courts are quite different from these in the Third Level Courts. Whereas environmental characteristics are important for the latter, personal judge characteristics completely dominate in Second Level Courts. This conforms to our expectations about situations where environmental features of states have relatively little relationship to dissent.

Socio-economic and Political Variables and Judges' Characteristics: the B' Relationships

The Second Level Court model, of course, presumes the absence of strong relationships between urbanism and political competitiveness on the one hand and personal judge characteristics on the other. Table 7 investigates these relationships. The occurrence of some fairly large coefficients involving environmental judge characteristics are not inconsistent with this model, however, since these characteristics are not related to dissent rates. More critical to the model is the mixed pattern of B' relationships with respect to personal judge characteristics.

⁴³ Canon and Jaros, "External Variables, Institutional Structure and Dissent on Supreme Courts," *loc. cit.*

Though not as consistent with the model as the total absence of relationships, these results suggest that at most, any connection between socio-economic and political variables and dissent rates through personal judge characteristics is a limited one—far less, for example, than those demonstrated for Third Level Courts.⁴⁴

TABLE 7

RELATIONSHIP OF STATE URBANISM AND POLITICAL COMPETITIVENESS
TO JUDGES' CHARACTERISTICS IN SECOND LEVEL COURTS

	Urbanism	Political Competitiveness
Environmental Judges' Characteristics		
Metropolitan Practice	.21	.03
Rural Practice	-.49	-.03
Partisan Homogeneity	-.01	-.28
Religious Diversity	-.19	-.03
Personal Judges' Characteristics		
Bachelor's Degree	.25	.02
Legislative Office	.37	-.17
Lower Judgeship	-.37	-.40
Civic Organizations	.12	.10

"A comment on the previous judicial and previous legislative experience variables is in order here. Tables 5 and 7 show, as one might expect, that the occurrence of this experience is rather highly correlated with urbanism and political competitiveness. The more urban and politically competitive the milieu, the more supreme court judges are likely to be ex-legislators, while in opposite environments more high court judges have background experience in the lower judiciary. The authors expected that given the dissensual nature of legislative bodies, courts containing members who were former legislators would be more prone to high dissent rates while those heavily populated by judges elevated from a lower bench would be more likely to strive for consensus. This seemed especially likely given the fact that the proportion of former legislators on a court correlated highly with urbanism and political competitiveness.

However, the data turned out contrary to our expectations as Table 2 illustrates. Previous legislative experience is negatively correlated with dissent at moderate levels while previous judicial experience is generally positively correlated with dissent, although not very markedly so.

The clear inference here is that ex-legislators are not dissenters. More particularly, in courts in highly urban and political competitive states which, of course, have higher rates of dissensual behavior, former legislators cannot be blamed for

Interaction in the Second Level Court Model

The limited nature of the connection mentioned in the previous paragraph is confirmed when we control the A' relationships for judge characteristics. Partial correlations between urbanism and political competitiveness on the one hand and dissent rates on the other controlling for personal judge characteristics, environmental judge characteristics, or all judge characteristics simultaneously are not notably different from the zero order relationships. This in marked distinction, of course, to the situation in Third Level Courts.

Thus, one must look elsewhere for an explanation of much of the variance in personal judge characteristics which in turn affect dissent rates on state supreme courts. Needless to say, this suggests a fair degree of validity for the Second Level Court model, though of course it does nothing to specify the nature of the "unknown dimensions" nor the D' relationships.

CONCLUSION

Our basic premise that the concept of judges' characteristics can be useful in (1) interpreting "external" explanations of dissent in certain state supreme courts, and in (2) developing new explanations of dissent in other kinds of state supreme courts has been shown to be largely valid. Variance in dissent in state supreme courts which hear cases filtered through an intermediate appellate tribunal (Third Level Courts) is unquestionably related to the socio-economic and political features of the states in which they are located. This relationship to a considerable extent depends upon the fact that these features affect the environmental characteristics of judges, which in turn are associated with dissensual behavior. Dissent in state supreme courts which hear cases directly from the trial level (Second Level Courts) is not associated with the state environmental features. Its explanation clearly lies in judges' characteristics, though in this case the char-

this phenomenon. Based upon the correlations in Table 2, we cannot conclude that judges with previous judicial experience are largely responsible, but they seem more prone to dissent than do ex-legislators.

Just why courts containing large numbers of ex-legislators should be less dissent-prone than others is hard to say. Perhaps having had less judicial experience they have less confidence in their isolated judgments when stacked against the majority of their colleagues, or perhaps they take the norm of judicial unanimity or consensus more seriously than do more blasé "old hands" at the judicial game.

acteristics appear to be reflective of configurations of individual personality or experience in judges rather than socio-economic or political environment.

This finding is noteworthy in and of itself, for it contributes to our understanding of state supreme courts as significant distributors of political values. But in addition it allows us an insight into a recent controversy occurring among scholars of the judicial process. The controversy concerns the extent to which dissensus in collegial courts reflects differences in judges' socio-economic or political background—our environmental characteristics. Several scholars have, in part at least, attempted to “explain” judges' votes in non-unanimous cases by focusing on background characteristics.⁴⁵ This emphasis has been challenged by Grossman who argues that if such background characteristics have “explanatory” power, they ought to be incorporated into a theory which would explain voting behavior in unanimous cases as well as dissensual ones—something which has been neither attempted nor accomplished.⁴⁶ Goldman, in dialogue with Grossman, maintains that unanimous decisions result not so much from attitudinal agreement stemming from common backgrounds as from particular types of institutional situations and/or case stimuli which virtually leave all judges without viable decisional alternatives.⁴⁷ This paper demonstrates that institutional arrangements, in this case the presence or absence of an intermediate level appellate court, play a large role in governing the extent to which variance in judges' environmental characteristics correlates with differential dissent rates. In other words, environmental characteristics do “explain” much dissensual behavior in some collegial court situations and are virtually unrelated to it in others.

Going beyond the problem of causes of dissensual behavior, we are faced with the more important task of investigating judges' decisional output and its relationship to judges' characteristics and to their social and political environments. Though this paper does not deal with

⁴⁵ See the works discussed in Grossman, “Social Backgrounds and Judicial Decision-Making.”

⁴⁶ Joel B. Grossman, “Social Backgrounds and Judicial Decisions: Notes for a Theory,” *Journal of Politics*, XXIX (May, 1967), 334-51; and Joel B. Grossman, “Fuller Thoughts on Consensus and Conversion: A Reply to Professor Goldman,” *Journal of Politics*, XXXI (February, 1969), 223-29.

⁴⁷ Sheldon Goldman, “Backgrounds, Attitudes and the Voting Behavior of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions,” *Journal of Politics*, XXXI (February, 1969), 214-22.

decisional output per se, it does suggest the range of agreement or disagreement here is conditionally dependent upon judges' background characteristics and environmental conditions within the states, the nature of the dependency being related to institutional structure. These variables, we would hope, will be an integral part of future investigations into the processes by which state supreme courts make judicial policy.